Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-367

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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September, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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No. .....

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on the 16th day of May, 1975. A Petition for Rehearing was denied on the 16th day of June, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, in this case, is unpublished by direction of that court, and therefore does not appear in the official decision. The unpublished opinion appears, verbatim, in the Appendix to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the order of the United States Court of Appeals is believed to be conferred by 48 U. S. Statutes, 926, and which states, in its pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods (a) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

The petitioner-corporation filed a Chapter X Petition for Reorganization which was approved by a District Judge, and a date was set for hearing a plan of reorganization. The questions presented for review are:

1. Whether, prior to the presentation of the plan, another District Judge to whom the case was assigned, may, or should, without either notice to the debtor, or a hearing, exclude all the property of the debtor from the Chapter X proceeding so that it may be sold at a state court foreclosure sale on that same day.
2. Whether real property of a debtor in reorganization, which has an actual value greatly in excess of the mortgage indebtedness against it, should be excluded from a Chapter X proceeding upon the ex-parte application of the mortgage creditor.
3. Whether a desire, and need, of a debtor to escape from the jurisdiction of the state courts, and the point in time at which Bankruptcy Court jurisdiction is sought, are, of themselves, a showing of bad faith when the debtor was never accorded an opportunity to present a plan of reorganization and carry its burden of proving lack of that assumed bad faith.

4. Whether the United States Court of Appeals, Tenth Circuit, committed additional error in forgiving the creditor for its omission to give notice of its Application to Exclude Property, and obtaining the ex-parte order without a hearing on the merits.
5. Whether the United States Court of Appeals, Tenth Circuit, abandoned its judicial function when it condoned district court proceedings which that appeals court itself also characterized in its opinion as "most unsatisfactory."

PROVISIONS OF LAW INVOLVED IN THE CASE

Petitioner claims a right of relief under Chapter X of the Bankruptcy Act of July 1, 1898, as amended, the pertinent provisions of which appear as Appendix D, hereof, 11 U.S.C. 541, 11 U.S.C. 544, 11 U.S.C. 545, 11 U.S.C. 546, 11 U.S.C. 548, 11 U.S.C. 561, 11 U.S.C. 606, 11 U.S.C. 607, and 11 U.S.C. 610.

STATEMENT OF FACTS

On the 15th day of March, 1974, the Petitioner filed in the United States District Court for the Western District of Oklahoma a Petition as provided for in Chapter X of the United States Bankruptcy Act. At the time of filing, the Honorable Luther B. Eubanks, Judge of the United States

District Court for the Western District of Oklahoma, entered an Order approving said Petition, continuing the Petitioner in possession, and enjoining the commencement or continuation of any action at law, or suit or proceedings in equity against said Debtor.

At the time of the filing of said Petition for Reorganization, there was pending against the Petitioner, in the District Court of Pottawatomie County, a suit in foreclosure (District Court Case No. C-73-260) wherein a foreclosure sale of certain property owned by the Debtor-Appellant was ordered to be held on the 19th day of March, 1974. The plaintiff in this foreclosure lawsuit was the American National Bank and Trust Company of Shawnee, Oklahoma, which was also the principal creditor of the Petitioner. In the foreclosure lawsuit, the 19th day of March, 1974, at 10:00 o'clock a.m. had been set by the District Court of Pottawatomie County as the date and time for the sale, at a Sheriff's foreclosure sale, of the Petitioner's property located in Pottawatomie County, and which is set out and fully described in the Chapter X Petition on file in this case.

On the 18th day of March, 1974, the attorney for the American National Bank and Trust Company of Shawnee, Oklahoma, appeared before the Honorable Luther Bohanon, and made an oral application for the dismissal of the Petitioner's Chapter X Petition and further requesting that the real property of the Petitioner, which was the subject of the foreclosure suit in Pottawatomie County be excluded from the Bankruptcy proceedings, in order that the Bank-Creditor could continue with its foreclosure action. Reference to the record in this Appeal will conclusively show that there was no proper notice given by said Bank-Creditor, to either the Petitioner or to any other Creditor or interested party. In fact, reference to the District Court Docket Sheet will show that the Entry of Appearance of the attorney for the Bank-Creditor, was also made on that same day of March 18, 1974.

Further reference to the Docket Sheet of the District Court proceedings will show that the Application of the Bank-Creditor, for the relief for which it sought, and obtained, was not filed until March 19, 1974.

At this point, the Court's attention is called to the minute of the court made on March 15, 1974, which specifically provided for a hearing of objections to the continuation of the "Debtor" in possession to be held on April 22, 1974, and which points out that this ex-parte appearance of the Creditor-Bank, before Judge Bohanon on March 18, 1974, was a total disruption of the orderly proceeding of this case.

On the 19th day of March, 1974, the attorney for the Creditor-Bank again appeared before the Honorable Luther Bohanon, with an Order to be signed by the said Judge, which purportedly reflected the alleged proceedings which had taken place on the previous date. At this time, the principal officer of the Petitioner appeared with the Company's attorney, and objected to the signing of the Order. The Trial Judge refused to sign the Order first presented to him by the Bank's attorney with the statement that it was not what he agreed to. This event transpired at approximately 9:50 a.m. on the day of March 19, 1974, and

upon the Judge's refusal to sign the Order as presented, the meeting was concluded and all parties left the Judge's chambers. At some later hour, on that same day, an Order was filed in the case, signed by Judge Bohanon, approved only by the attorney for the Bank-Creditor, and which vacated the Order of Judge Eubanks, approving the Chapter X Petition and continuing the Debtor in possession. This Order also specifically allowed the American National Bank and Trust Company to conduct all sale and other proceedings in Case No. C-73-260, and at 10:00 o'clock a.m., on that same day, the Sheriff of Pottawatomie County, Oklahoma, struck off and sold, at public auction, to the only bidder at that sale, the real property of the Debtor-Corporation.

The property foreclosed upon sold for $28,000.00 more than necessary to completely satisfy the debts sued upon by the American National Bank and Trust Company of Shawnee, Oklahoma. The price obtained at the Sheriff's Sale was $114,000.00 and the Bank's judgment was $86,-000.00, leaving the excess of $28,000.00.

On March 22, 1974, this case was referred to Bankruptcy Judge David Kline, to hear and determine all matters not specifically reserved to the District Court by Chapter X of the Bankruptcy Act.

On April 4, 1974, the Bankruptcy Judge entered an Order to set down for hearing the Application of the Petitioner for a temporary delay of disbursement of the proceeds of the foreclosure sale. Thereafter, on April 9, 1974, for no apparent reason known to the Petitioner, the Bankruptcy Judge vacated the Order for the Show Cause hearing on the Debtor's Application for delay of disbursement.

On April 18, 1974, the present Counsel for the Petitioner filed with the Bankruptcy Court a motion to reconsider the rulings of the District Judge made on March 18, and March 19, 1974, wherein the real property of the Petitioner was excluded from the Chapter X proceedings and this matter came on for hearing before the Bankruptcy Judge on May 14, 1974. After a brief hearing the Bankruptcy Judge declined to exercise jurisdiction over the matter and referred the case to the District Court to be heard by Judge Bohanon.

On June 6, 1974, the Petitioner's motion to reconsider came on for hearing before the Honorable Luther Bohanon, and the transcript of that proceeding shows the following events to have transpired:

(1) On page 2, the Petitioner's attorney commences with an opening statement of the relief being sought.

(2) At the middle of page 3, the District Judge interrupts Counsel for the Petitioner and turns to hear what Mr. Robinson, attorney for the purchaser at the foreclosure sale, has to say.

(3) At the bottom of page 4, the court inquires, as to whether the "Debtor" has any evidence to be presented; this attorney replied "yes," and gave a brief statement of its nature.

(4) At page 6, the court states that the application will be denied.

(5) At page 8, the court states that the "Debtor" can take an appeal, if it wants to, and reiterates on that same page that the "Debtor" had better take it to the Tenth Circuit Court of Appeals.

The proceeding which appears in this transcript is the only adversarial hearing with notice which ever took place before the District Court in this Chapter X proceeding. This hearing did not take place until after the property of the Debtor had been excluded from the Chapter X proceeding and had been dissipated by an unfair foreclosure sale held by the Creditor-Bank. At this hearing, the Petitioner was denied all fair opportunity to present evidence as to why it should be left in possession of its property, at least for the time necessary to have presented a plan of reorganization to the District Court. It is patently clear that the Judge's decision was made without the Petitioner being given an opportunity to fully state its case and to present any evidence whatsoever. It is also clear, from the total record on appeal, that there had been no prior opportunity for the Petitioner to state its case and present evidence as to why it should be left in possession of its property and be allowed to present a plan of reorganization to the District Court.

The Order of Judge Bohanon of the 18th day of March, 1974, which excluded the Debtor's property was approved only by the attorney for the American National Bank and Trust Company of Shawnee, Oklahoma, and inaccurately recites that the Debtor appeared "by its attorney, B. J. Brockett." In truth and fact, the Debtor was unrepresented and had no notice of the Bank-attorney's March 18 appearance before the court. Therefore, the Petitioner-Debtor's property was excluded without notice and as a result of a non-adversarial "hearing."

Another grossly erroneous Order of the court is Judge Bohanon's Order of June 6, 1974, which dismissed the Chapter X Petition. This order improperly recites in numbered paragraph 4:

> "That Counsel for the Debtor, Parker Square, Inc., does not dispute the arguments of Counsel for the American National Bank of Shawnee, Oklahoma, and that there is no reason for the Court to retain jurisdiction herein."

This Order was also not approved by the Debtor's attorney. A brief reading of the transcript of proceedings of June 6, 1974, will show paragraph 4 to incorrectly reflect the happenings of that day.

A motion was filed asking the court to correct the Order, and setting out that *Debtor's Counsel had actually objected to opposing Counsel of the form and Order and had approved one in an alternative form.* The court entered a minute stating that he was without jurisdiction to take action on the Debtor's motion to correct the Court's Order and that its filing is for naught.

This concluded the District Court proceedings.

REASONS FOR GRANTING THE WRIT

1.

BAD FAITH WAS ONLY INFERRED BY THE TRIAL COURT FROM THE PETITIONER'S DESIRE TO ESCAPE FROM THE STATE COURT PROCEEDING.

Throughout the proceedings in the trial court none of the reasons of bad faith, as set out in Section 546, were argued except that which relates to the pendency of prior proceedings in other courts. In fact, the only reason which was ever cited by the Trial Judge as any basis for his decision is best exemplified on page 6, Vol. III of the record on appeal, where the Trial Judge interrupted Counsel to make the following statement:

> "THE COURT: (Interposing) Well, you came to this Court when the doors were about to be shut on you in the State Court and you asked this Court to proceed and vacate and stop the State Court proceedings.
>
> "The information that I had, and I am sure the record will show that the plaintiff in that case had been begging and crying and hounding the debtor to pay, to pay, to pay. They never did so. Then they brought the foreclosure action, they got a judgment and then sold it, and then vacated it, and then sold it again, and you come to this Court; and they were entitled to foreclose their judgment.
>
> "The Court will deny your application."

These statements by the Trial Judge show that he took the view that the Petitioner's attempts to escape the consequences of the State foreclosure action were *prima facie* evidence of bad faith, and was his justification for dismissal

of the petition. Such a conclusion or position by the Trial Judge is gross error. In the first place, the Bankruptcy Act itself provided, in 11 U.S.C.A. 548:

> "that the initial order approving the petition,
>
> * * * * * *
>
> "shall operate as a stay of prior pending bankruptcy, mortgage foreclosure, or equity receivership proceedings, and of any act or other proceeding to enforce a lien against the Debtor's property."

By no means could it be said that a result, which was produced by the terms and provisions of the Bankruptcy Act itself, is a showing of bad faith.

Also, with respect to whether a desire to escape from the foreclosure suit in Pottawatomie County is a showing of bad faith, this Court is referred to the case of *Marine Harbor Properties* v. *Manufacturers Trust Company*, N.Y. 1942, 63 S.Ct. 93, 317 U.S. 78, 87 L.Ed. 64, 51 Am. Bankr. Rep. N.S. 1, *rehearing denied* 63 S.Ct. 254, 317 U.S. 710, 87 L.Ed. 566. Wherein it is stated by the Court:

> "(A)nd, in determining whether petition for corporate reorganization has been filed in 'good faith' as required by this Chapter, the alleged desire of the corporation to escape from prior proceedings is immaterial."

Therefore, there is not a rational basis for the denial and dismissal of the Debtor's petition for reorganization on the sole premise that it is attempting to escape the consequences of the foreclosure lawsuit in Pottawatomie County, nor is there a rational basis for denying or dismissing the petition on the grounds that it is unreasonable to

believe that a plan of reorganization would be successful, because there has not been one iota of evidence presented by any creditor to show that a plan of reorganization would fail, and the Petitioner has not been accorded an opportunity for a hearing to present such a plan and demonstrate, from evidence, that it in fact does have a chance for success.

2.

THE EXCLUDED PROPERTY OF THE PETITIONER HAD A VALUE SUBSTANTIALLY IN EXCESS OF THE MORTGAGE INDEBTEDNESS, AND SUCH BEING THE CASE, IT WAS ERROR FOR THE COURT TO EXCLUDE SAID PROPERTY FROM THE PROCEEDING AND TO DISMISS THE PETITION WITHOUT SOME EVIDENTIARY SHOWING OF OTHER PREJUDICE TO THE CREDITORS.

The total mortgage indebtedness sued on by the American National Bank and Trust Company, in the Pottawatomie County foreclosure was $86,000.00. The property of the Petitioner was sold twice at foreclosure sale, the first sale being set aside for irregularities. At the first sale, the property brought a price of $112,000.00; at the second sale, it brought a price of $114,000.00. It was appraised by three court-appointed appraisers at $171,000.00. Under these circumstances, the Creditor-Bank cannot be heard to say that it was insecure.

The Bankruptcy cases show a traditional reluctance of the courts to exclude mortgaged property from a Chapter X proceeding, so that a Creditor may foreclose upon it where there is no immediate danger of the Creditor's loss of that security and where the security has a value substantially in excess of the encumbrance. This is demonstrated in the case of *In re U. S. Realty and Implement Company*, C.C.A. N.Y. 1946, 153 F.2d 853. In the *U. S. Realty* case, the Court properly continued an injunction restraining a bank from realizing on its mortgage, pending efforts to work out reorganization of the Debtor, because the margin of security for the debt was so large to insure the bank against any probable loss for a considerable period of time. Exactly those circumstances existed in this case, but rather than to follow the established case law, the District Court excluded the property so as to allow the bank to continue its foreclosure and later dismissed the petition in its entirety.

In the case of *Marine Harbor Properties* v. *Manufacturer's Trust Company* (*supra*), a petition for reorganization was disapproved, but only upon a clear showing that the corporate debtor's property was worth less than the first mortgage indebtedness on it and that continuation of State Court foreclosure proceedings would not deny junior creditors any benefits which corporate reorganization proceedings would afford them. The *Marine Harbor* case sets out the evidentiary considerations which must be made before a reorganization court permits foreclosure upon a debtor's property which has substantial equity. The rationale of these decisions is: that where a secured creditor is over-secured and where there is no immediate danger of loss of value of that security, any substantial equity in that property should be retained in the Bankruptcy reorganization estate for at least so long a time as necessary to determine whether the junior creditors can be benefited without permanent loss to the secured creditor. In this case,

there was a total failure by the District Court to make such consideration for the benefit of junior creditors. Also, the summary exclusion of the real property from the Debtor's estate and the later summary dismissal of the reorganization petition worked a severe prejudice to the Petitioner by unnecessarily foreclosing the possibility of a rehabilitation. This was a total failure of the District Court to follow the criteria, set out by this Supreme Court in its prior decisions, and this failing was repeated by the Court of Appeals, Tenth Circuit.

3.

THE PETITIONER WAS DENIED ITS RIGHT TO A HEARING UPON PROPER NOTICE PRIOR TO THE EXCLUSION OF ITS PROPERTY FROM THE CHAPTER X PROCEEDING.

It is provided in 11 U.S.C. 544 that if an Answer be filed by any creditor, which controverts any of the material allegations of the petition, the Judge shall, as soon as may be, "determine" without the intervention of a jury, the issues presented by the pleadings and enter an Order approving the petition, if satisfied it complies with the requirements of "good faith," or dismissing it if not so satisfied.

It is unequivocally stated in 11 U.S.C. 606 that "the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter."

The Bankruptcy Act is rather flexible with regard to the notice required in most instances. It is generally provided in 11 U.S.C. 607, that except where otherwise provided, the Judge may, from time to time, enter Orders

respecting notice requirements. The combined effect of these statutes is to require that upon a filing and initial approval of a Chapter X petition, even though it might be done *ex parte*, that subsequent to that time any issues to be joined must be done so by the filing of an Answer by one or more of the creditors and that a determination, upon notice, must then be made upon those pleadings.

The District Court Judge did not follow the Statutes of the United States and require proper notice to be given to the Petitioner, nor did he accord the Petitioner the right to be heard on matters arising in the proceeding. Neither did the Court of Appeals, Tenth Circuit, follow and observe the Statutes of the United States when it affirmed the District Court decision.

4.

THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE COURT OF APPEALS SANCTIONED THE DEPARTURE SO AS TO REQUIRE AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The District Court's omission to follow the Statutes of the United States and the decisions of this Supreme Court is a gross departure from usual and accepted judicial proceedings. The subsequent affirmation of the District Court's rulings and decision by the Court of Appeals, especially upon that Court's statement that the District Court proceedings were "most unsatisfactory," was a further departure from usual and accepted judicial proceedings. Such departures from the accepted and usual course of judicial

proceedings calls for an exercise of this Supreme Court's power of supervision.

Respectfully submitted,

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Counsel for Petitioner

September, 1975

APPENDIX A

FILED
MAR 19 1974
Rex B. Hawks
Clerk, U. S. District Court
Alice Faye Johnson,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
PARKER SQUARE, INC.,	)	THE REORGANIZATION
a corporation,	)	OF A CORPORATION
	)	No. BK-74-434
Debtor.	)	

ORDER VACATING ORDER APPROVING PETITION AND CONTINUING DEBTOR IN POSSESSION

On this 18th day of March, 1974, the Application of the American National Bank and Trust Company of Shawnee to vacate the Order Approving Petition and Continuing Debtor in Possession filed herein on March 15, 1974, came on to be heard and the Applicant, American National Bank and Trust Company of Shawnee, appeared by its attorney, Sidney R. Clarke III, and Parker Square, Inc., appearing by its attorney, B. J. Brockett.

The Court examined the file, heard argument of counsel and FINDS; and

It is therefore ORDERED, ADJUDGED and DECREED that the allegations of Applicant's verified Application are true and correct and for the reasons stated therein the Order Approving Petition and Continuing Debtor in Possession filed March 15, 1974, should be vacated to allow Applicant to conduct all sale and other proceedings in American National Bank and Trust Company vs. Parker

Square, Inc., Case No. C-73-260 and to allow the Court Clerk of Pottawatomie County of Oklahoma, to pay and distribute the proceeds of the sale of the real property involved in satisfaction of Applicant's Judgment against defendant in said cause.

s/ Luther Bohanon
Luther Bohanon
United States District Judge

APPROVED:

s/ Sidney R. Clarke III
Clarke & Van Wagner, Inc.
Attorney for Applicant
American National Bank and
Trust Company of Shawnee
P.O. Box 1117—130 North Broadway
Shawnee, Oklahoma 74801
Phone: 405/275-1045

FILED
JUL 2 1974
Rex B. Hawks
Clerk, U. S. District Court
By Judith (illegible),
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
PARKER SQUARE, INC.,	)	THE REORGANIZATION
a corporation,	)	OF A CORPORATION
	)	No. BK-74-434

ORDER

NOW, on this 6th day of June, 1974, there comes on for hearing before this Court Debtor's Motion to Reconsider and the Application of Windsor Finance Corporation for

Trustee to Remove Personal Property. The Debtor, PARKER SQUARE, INC., appears in person by Charles O. Parker and by counsel, Riley Brock; Trustee Bob Garretson appears in person; American National Bank of Shawnee appears by counsel, Sidney R. Clarke, III; and Windsor Finance Corporation appears in person by Jim Sutherland and by counsel, James F. Robinson.

The Court being fully advised in the premises, and after hearing arguments of counsel, finds:

1. That the premises known as PARKER SQUARE, INC. Bowling Alley in Shawnee, Oklahoma was sold on March 19, 1974 at a Sheriff's Sale pursuant to Court Order to Windsor Finance Corporation.

2. That said sale was confirmed by the District Court of Pottawatomie County, Oklahoma on March 26, 1974.

3. That this Court makes no determination as to the validity of said sale, but after hearing arguments of counsel, determines that Debtor's Motion to Reconsider should be overruled.

4. That counsel for Debtor, PARKER SQUARE, INC., does not dispute the arguments of counsel for the American National Bank of Shawnee, Oklahoma and that there is no reason for the Court to retain jurisdiction herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Debtor's Motion to Reconsider be and hereby is overruled; that the Trustee, Bob Garretson, be and hereby is discharged in this cause; that the bankruptcy proceedings be, and hereby are dismissed; that the District Court of Pottawatomie County be, and hereby is ordered to proceed in this matter without further interference from this Court.

s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

[APPENDIX]

APPROVED:

RILEY BROCK
Attorney for Parker Square, Inc.

s/ G. R. Garretson
BOB GARRETSON, Trustee

s/ Sidney R. Clarke, III
SIDNEY R. CLARKE, III
Attorney for American National Bank of Shawnee

s/ James F. Robinson
JAMES F. ROBINSON
Attorney for Windsor Finance Corporation

APPENDIX B

FILED
MAY 16 1975
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In the Matter of	)	
	)	
PARKER SQUARE, INC.,	)	No. 74-1502
a Corporation,	)	
	)	
Bankrupt.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. BK-74-434)

Douglas D. Althoff (Riley Brock on the brief) for Bankrupt.

George Van Wagner, of Clarke & Van Wagner, Inc., for American National Bank and Trust Company.

Before LEWIS, Chief Judge, and BREITENSTEIN and McWILLIAMS, Circuit Judges.

PER CURIAM.

In this Chapter X bankruptcy the controversy revolves around the refusal of the trial court to stay a court foreclosure sale. We affirm.

In March, 1965, the debtor, Parker Square, Inc., gave a mortgage on Oklahoma real estate to American National Bank and Trust Company. Because of debtor's defaults, Bank in July, 1973, brought foreclosure proceedings in an Oklahoma state court. On October 29, 1973, the state court gave judgment for Bank and against the debtor in the amount of $83,378.87 plus interest. On court order the property was sold for $112,000. The sale was set aside because of an inadequate appraisal. On February 13, 1974, the court again ordered sale which was to be held on March 19 at 10:00 A.M.

Late in the afternoon of Friday, March 15, debtor filed a Chapter X petition which was approved by Judge Eubanks acting for Judge Bohanon. The effect of this action was to stay automatically the state court foreclosure sale. On the afternoon of Monday, March 18, an attorney for Bank appeared before Judge Bohanon and made an oral request for an order which would permit the foreclosure to proceed. Judge Bohanon agreed and requested the preparation of a written order.

On the next day and before 10:00 A.M., the time set for the foreclosure sale, the Bank attorney presented the order which he had prepared. The then attorney for the debtor was present. The judge did not sign the order because his intent was only to permit the foreclosure to proceed and not to dismiss the Chapter X proceedings. A corrected order was entered later in the day.

The foreclosure sale went ahead and the property was sold for $114,000. The state court approved the sale and ordered disbursement of the proceeds. The bankruptcy judge to whom, as special master, the Chapter X proceedings had been referred ordered a delay in the disbursement. This order was later vacated. The record is not clear on whether disbursement was made. On July 2, Judge Bohanon dismissed the Chapter X proceedings and three days later debtor filed its notice of appeal.

Bank was both a secured creditor and a substantial stockholder in debtor. No other creditors or stockholders have appeared in this appeal by the debtor corporation. The Chapter X petition lists as liabilities the first mortgage debt to Bank and a $30,000 second mortgage which debtor contests on the ground that it secures a personal debt of debtor's president. Additional liabilities were ad valorem state taxes, $1,391.95 and miscellaneous debts, $1,700. Debtor further stated in its petition that it had "only a small sum of cash on hand."

We are not interested in the charges, challenges, and recriminations of the parties. When all is said and done, the fact remains that debtor waited over eight months after the filing of the state foreclosure action and late on a Friday afternoon obtained an ex parte order which stopped the foreclosure sale set for the morning of the next Tuesday. If debtor had the equity which it claims in the property, a reasonable assumption is that it would have done something about the foreclosure during the eight-month period. The charge that Bank obtained the exclusion of the property from the Chapter X proceedings without formal notice is not impressive in the light of debtor's action in waiting until the last minute to file those proceedings.

We recognize the statement in Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78, 84, that a debtor's intent to escape state court jurisdiction is not itself a test of good faith in applying for Chapter X relief. Marine Properties also says that a Chapter X petitioner must demonstrate that Chapter X affords to creditors or stockholders some "benefits, advantages, or protection" which the state proceeding denies. In re Colorado Trust

Deed Funds, Inc., 10 Cir., 311 F.2d 288, 289, says that the burden of establishing good faith is on the petitioner.

Although the manner in which these proceedings were handled is most unsatisfactory, we believe that the manifest intent of the Chapter X filing was to delay the state foreclosure. The petition was properly dismissed. See Arey & Russell Lumber Co., Inc. v. American Nat. Bank & Trust Co., of Danville, Virginia, 4 Cir., 201 F.2d 508. We are convinced that no good purpose would be served by any attempt at this time to unscramble the events which have occurred.

Affirmed.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, DENYING PETITION FOR REHEARING

MAY TERM—JUNE 16, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Jean S. Breitenstein and The Honorable Robert H. McWilliams, Circuit Judges

IN THE MATTER OF:	)	
	)	
PARKER SQUARE, INC., a corporation,	)	
Bankrupt,	)	
	)	
PARKER SQUARE, INC.,	)	
Appellant,	)	
vs.	)	No. 74-1502
	)	
BOB GARRETSON, Trustee, AMERICAN NATIONAL BANK OF SHAWNEE and WINDSOR FINANCE CORPORATION,	)	
Appellees.	)	

This matter comes on for consideration of the appellant's motion to file a petition for rehearing out of time; the appellant's petition for rehearing with suggestion for rehearing en banc; and the appellant's motion to stay the mandate, which issued June 9, 1975.

Upon consideration whereof, it is ordered as follows:

(1) The motion to file a petition for rehearing out of time is granted. The petition for rehearing is ordered filed this date.

(2) The petition for rehearing is denied on the merits.

(3) The motion to stay the mandate is denied.

HOWARD K. PHILLIPS, Clerk

s/ By: Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

s/ Mary A. Sherman
Deputy Clerk

APPENDIX D

Applicable Provisions of the Bankruptcy Act of 1898. Title 11, United States Code.

§ 501. Exclusive application of chapter

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

§ 541. Petition of debtor

Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied.

§ 544. Controversial answer by creditor, indenture trustee, or stockholder; determination of issues

If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing if not so satisfied.

§ 545. Finality of determinations

If any issue raised in an answer filed under section 536 or 537 of this title has, after hearing upon notice to the debtor, creditors, indenture trustees, and stockholders entitled to controvert the allegations of the petition, already been tried and finally determined under the provisions of section 543 or 544 of this title, such final determination shall be conclusive for all purposes under this chapter.

§ 546. Good faith of petition

Without limiting the generality of the meaning of the term "good faith", a petition shall be deemed not to be filed in good faith if—

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; or

(2) adequate relief would be obtainable by a debtor's petition under the provisions of chapter 11 of this title; or

(3) it is unreasonable to expect that a plan of reorganization can be effected; or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be the best subserved in such prior proceeding.

§ 548. Order of approval as stay of other proceedings

Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property.

§ 561. Hearing; time and notice

The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition, of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate.

§ 606. Persons entitled to hearings

The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard

on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees.

§ 607. Intervention of parties; notices generally

The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.

§ 610. Same; statement by attorney

An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition.

CERTIFICATE OF SERVICE

I certify that on the ..... day of September, 1975, I forwarded by first class mail, three copies of the foregoing Petition for Certiorari to the following:

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Attorney for the American
National Bank of Shawnee
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Shawnee, Oklahoma 74801

James F. Robinson
Attorney for Windsor
Finance Corporation
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.....

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Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-367

In the Matter of Parker Square, Inc.,
a Corporation,
Bankrupt.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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October, 1975

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In the
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-367

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
Bankrupt.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

STATEMENT OF FACTS

On March 10, 1965, as security for a note, Petitioner herein, Parker Square, Inc., gave Respondent herein, American National Bank and Trust Company of Shawnee, Shawnee, Oklahoma, a mortgage on real property. On July 11, 1973, Bank filed a Petition against Debtor in the District Court of Pottawatomie County, Oklahoma, Case Number C-73-260, based on the note and mortgage dated March 10, 1965, seeking a money judgment and foreclosure and sale of the mortgaged property. On October 29, 1973, judgment was rendered by the State Court against Debtor on Bank's Motion for Summary Judgment for the sum of $83,378.87 plus interest. On November 21, 1973, Debtor's Motion for New Trial was overruled. On December 7, 1973, Bank caused Execution and Order of Sale to be issued by the

Court Clerk. Notice of Sale was first published December 21, 1973, and appraisement was returned in the amount of $159,000.00. On February 6, 1974, the State Court denied confirmation of sale because the appraisal did not include the car-wash facilities. On February 13, 1974, Bank caused Execution and Order of Sale to again issue, notice of sale was published on February 15, 1974, giving notice that on March 19, 1974, at 10:00 a.m. the mortgaged property of Debtor would be sold to satisfy the judgment, and appraisement was returned in the amount of $171,000.00. On March 8, 1974, Petition to Vacate Judgment filed by Debtor on January 30, 1974, was overruled and Petition dismissed.

Then on March 15, 1974 (*Friday, at 3:55 p.m.*), Debtor filed its Petition for Proceedings under Chapter 10 of the Bankruptcy Act in Case Number BK-74-434 in the United States District Court for the Western District of Oklahoma. Judge Bohanon signed on behalf of Judge Eubanks an *ex parte* Order approving the Petition and continuing the Debtor in possession of the mortgaged property and enjoining its sale.

On March 18, 1974 (Monday), Sidney R. Clarke III, attorney for Bank, told the attorney for Debtor in the State Court proceeding, Irvin Owen, that he intended, that afternoon, to request Judge Bohanon to exempt the State Court foreclosure proceeding from the Chapter 10 Bankruptcy proceeding. That afternoon, Mr. Clarke, with Mr. Ken Spears, an office associate of B. J. Brockett, the then attorney for Debtor in the Bankruptcy proceeding being present, orally requested Judge Bohanon to dismiss the Bankruptcy proceeding and allow the State Court foreclosure sale to be

held on the following day as scheduled. The Judge agreed with Bank's attorney, requested he prepare an Order for the Judge's signature, and caused to be entered on the Docket a minute showing his Order excluding the State foreclosure sale from the Chapter 10 proceeding.

On March 19, 1974, prior to 10:00 a.m., Sidney Clarke III appeared before Judge Bohanon with a written application and Order to Exclude Property from Bankruptcy Proceeding for signature. C. O. Parker, President of Debtor, and B. J. Brockett, then attorney for Debtor, were present and the Motion of Bank heard on the previous day was discussed again. Judge Bohanon affirmed his decision in favor of Bank, but did not sign the Order presented by Mr. Clarke because the language therein dismissed the entire Chapter 10 proceeding when Judge Bohanon desired only to order property in the State Court foreclosure proceeding excluded from the Chapter 10 proceeding. Judge Bohanon ordered that the foreclosure proceeding be excluded and directed Mr. Clarke to prepare an Order to that effect. The Order Vacating Order Approving Petition and Continuing Debtor in Possession was presented to Judge Bohanon after noon, was signed by him and filed in the case. At 10:00 a.m., the Sheriff of Pottawatomie County, in the State Court proceeding, sold said mortgaged real property to Windsor Finance Corporation for $114,000.00 and filed his Motion to Confirm.

On March 22, 1974, the Chapter 10 proceeding was referred to Judge David Kline except for certain excluded matters. On March 26, 1974, the State Court, after a hearing at which all parties and their attorneys were present, over-

ruled Debtor's Motion to Delay Confirmation of Sale, sustained Plaintiff's Demurrer to Debtor's evidence in support of Debtor's oral objections to Confirmation of Sale and expressly held therein "that the sale price of said property was not so grossly inadequate as to shock the conscience of the Court and that Debtor's right to redeem is expired, nor has he made a legal and sufficient exercise of said right of redemption." The Court confirmed the Sheriff's Sale of March 19, 1974, and ordered disbursements to be made on April 8, 1974, and ordered that the purchaser, Windsor Finance Corporation, be given possession of said property. On April 4, 1974, Judge Kline ordered the State Court Court Clerk to temporarily delay disbursing the proceeds of said sale and set a show cause hearing for April 16. On April 5, 1974, the State Court held a hearing on the various motions filed by Debtor, with all parties and their attorneys present, and denied Debtor's request to pay off the judgment and redeem the property and denied Debtor's request to reconsider confirmation of Sheriff's sale. A copy of Judge Kline's order was given to Bank's attorneys and called to the attention of the State Court and the State Court ordered that, pending the show cause hearing in the Bankruptcy Court, disbursement could be made only if Judge Kline's order was vacated. On April 9, 1974, Judge Kline vacated his previous order delaying disbursement of sale proceeds. On May 14, 1974, Judge Kline declined jurisdiction concerning Debtor's Motion to Reconsider filed April 18, 1974. On June 6, 1974, Debtor's Motion to Reconsider the Order of March 19, 1974, by Judge Bohanon allowing the State Court foreclosure sale was overruled. Bank's Motion to Dismiss the Chapter 10 proceeding was sustained.

July 5, 1974, Debtor filed Notice of Appeal to the United States Court of Appeals for the 10th Circuit. On August 8, 1974, there was filed an Order by Judge Bohanon that the Court is without jurisdiction to take action on Debtor's Motion to Correct the Court's Order of June 6, 1974, dismissing the Chapter 10 proceeding and allowing the State Court to proceed.

This concluded the District Court proceedings.

REASONS FOR DENYING THE WRIT

I.

THE COURT FOUND THAT DEBTOR'S PETITION WAS *NOT* FILED IN "GOOD FAITH" BECAUSE THE CHAPTER X PROCEEDINGS DID NOT GIVE GREATER BENEFIT TO THE CREDITORS AND STOCKHOLDERS THAN THE PENDING MORTGAGE FORECLOSURE.

The Petition for Relief under Chapter 10 was filed by Debtor (Petitioner) and the Order Approving Petition and Retaining Debtor in Possession was signed by Judge Eubanks on *ex parte* application and after review of only the Petition without hearing evidence or argument by the Bank.

It is provided in 11 U.S.C. 541 that:

> "Upon the filing of a Petition by a Debtor, the Judge shall enter an Order Approving the Petition, if satisfied that it complies with the requirements of this Chapter and has been filed in good faith, or dismissing it if not so satisfied."

The burden is on the Debtor to convince the Court that the Petition for Reorganization has been filed in good faith;

Marine Harbor Properties v. *Manufacturers Trust Company*, N.Y. 1942, 63 S.Ct. 93, 317 U.S. 78; 87 L.Ed. 64, 51 Am. Bankr. Rep. N.S. 1, *rehearing denied* 63 S.Ct. 254, 317 U.S. 710, 87 L.Ed. 566.

What is "good faith"? 11 U.S.C. 546 provides:

> "Without limiting the generality of the meaning of the term 'good faith' a Petition shall be deemed not to be filed in good faith if . . . §3—it is unreasonable to expect that a plan of reorganization can be effected or §4—a prior proceeding is pending in any Court and it appears that the interests of Creditors and Stockholders would be best subserved in such prior proceeding."

In re Metropolitan Realty Corporation, 433 F.2d 676 (5th Cir. 1970), *cert. denied* 401 U.S. 1008, 91 S.Ct. 1251, 28 L.Ed.2d 544 (1971):

> "The statute expressly states that the generality of the meaning of the term 'good faith' is not to be limited by the enumeration set down in Section 546."

In re Southern Land Title Corporation, 301 F.Supp. 379 (1969), at page 428:

> "'Good faith' implies an honest intent and genuine desire on the part of the Petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose such as, for example, merely to serve as a delaying tactic."

In re Loeb Apartments, 89 F.2d 461 (7th Cir. 1937):

> "If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist."

In re Suburban Properties, Inc., 110 F.2d 438 (7th Cir. 1940):

> "In determining whether the Petition is filed in good faith, the fact that there is a state court foreclosure suit pending which has proceeded far on its way toward final adjudication might well be considered."

If the Trial Judge is not satisfied that the Petition was filed in good faith, he must dismiss the Petition; see *Marine Harbor Properties, Inc.* (above).

At the time of entering the Order of March 18, exempting certain real property from the Chapter 10 proceedings, the Court had before it the Petition of Debtor and the Application to Exclude of Bank. Debtor argues that the Judge's only possible reason for exempting the real property from the Bankruptcy proceedings and allowing the State Court foreclosure sale was that the Debtor only filed to escape prior pending State proceedings. Debtor cites *Marine Harbor* (above) as authority for the proposition that in determining "good faith," Debtor's desire to escape from prior State proceedings is immaterial. But *Marine Harbor* is not like the instant case because there a State Court tried and failed to implement a reorganization plan. The Creditors' representative, a trustee, instituted foreclosure proceedings in State Court. Several months later, the Debtor filed a Petition under Chapter 10 of the Bankruptcy Act. The Trustee moved to dismiss the Petition because it was not filed in good faith. The trial court denied the motion. The Court of Appeals held that the Debtor's Petition was not

filed in good faith because the Debtor was seeking to escape the jurisdiction of the State Court which was attempting to reorganize the Debtor. The Supreme Court reversed saying that the escape factor was immaterial, and, at page 96, that "Congress in effect directed the bankruptcy courts not to approve petitions under Chapter 10 in such cases unless it appeared that the interests of creditors and stockholders would not be best subserved in the prior proceedings," and, at page 97, that the Petitioner "must demonstrate at least in some substantial particular the prior proceedings withhold or deny creditors or stockholders benefits, advantages, or protection, which Chapter 10 affords."

In the instant case the judgment was entered against the Debtor in October. A Sheriff's Sale was had and set aside in January. A second Sheriff's Sale was scheduled and the Court, after hearing the application of the Debtor on Monday to exempt the foreclosure proceeding, saw that the Debtor was making a last-ditch attempt to stop the foreclosure sale when all his efforts in State Court had failed. Only a Chapter 10 proceeding, because of the automatic injunction provisions of 11 U.S.C. 548, would allow the Debtor to stop the mortgage foreclosure. The Court could see that the Debtor had had many months to exercise its right of redemption under State law and pay off the note or the judgment and redeem the property, but had not been able to do so and alleged no facts showing it could do so in the future, but was merely trying to delay and harass the Bank's foreclosure proceeding (pages 13-14, Vol. I, Record on Appeal). Throughout Debtor's Petition (page 6, Vol. I, Record on Appeal) and in its argument it is obvious that the motivation of the Debtor was not to benefit creditors

and stockholders but only to secure additional time in hopes of finding financial backing to redeem the property. In the case of *In re DCA Development Corporation, et al., Debtors*, 489 F.2d 43 (1st Cir. 1973), the Court dismissed the petition for reorganization because debtor did not show a reasonable prospect of success in reorganization under 11 U.S.C. 546(4) where the evidence showed debtor could not obtain financing and had no definite prospects for such. In this case, after hearing Bank's Application, the Court decided that the Debtor had not satisfied its burden of proof in showing a good faith filing of its Petition. There appears nothing in the record on behalf of Debtor to indicate that reorganization would be beneficial to Creditors and Stockholders in any way which the State mortgage foreclosure could not provide *except* that it would delay the foreclosure and give Debtor additional time to attempt to raise money to redeem the property. The Court said in *Marine Harbor* that in that case there was no showing that the State foreclosure proceeding would not as adequately protect the interests of the Creditors after sale as a Chapter 10 reorganization would do, and that in view of the burden on Debtor the Bankruptcy Court would not be warranted in assuming that a state foreclosure proceeding on behalf of first mortgage creditors is inadequate by Chapter 10 standards. The Court said at page 98:

> "If there were a showing, for example, that the property was worth more than the amount of first mortgage indebtedness and it appeared that that excess value would be lost to the junior interests in the state proceedings or that the state proceedings were less adequate by reorganization standards than the bankruptcy court to protect such interests approval of the petition

> clearly would be justified whether filed by the debtor or by creditors. But, no such showing was made. Hence, it was not established that continuation of the state proceedings would deny the junior creditors any benefits which Chapter 10 would afford them."

In the instant case, the court was aware that the value of the real property exceeded Bank's claim and preserved for junior creditors any surplus over and above that needed to pay off Bank's judgment by impounding the surplus with the State Court Clerk (page 28, Vol. I, Record on Appeal).

Debtor claims in its Reason Number 2 that the Court erred in excluding the mortgaged property from the Chapter 10 proceeding and cites the case of *In re U. S. Realty and Implement Company*, 153 F.2d 853 (2nd Cir.) (which has not been cited to date in any opinion of a court of record). In that case, the Court had already decided that the Petition had been filed in good faith, had received a plan for reorganization and was refusing to enforce the trustee's promise to let the Bank foreclose. It is not analogous to the instant situation where the Court excluded the property being foreclosed and eventually dismissed the entire petition because of a lack of good faith in its original filing.

Debtor argues that the Court should have retained the real property for as long as necessary to determine whether junior creditors can be benefited without permanent loss to the secured creditor, but, in the instant case, the trial court did consider this matter when it decided further delay would be useless and allowed the property to be sold, but restrained, for the benefit of junior creditors, all proceeds over the amount necessary to pay the Bank.

It should be remembered that the Bank was, on March 18, 1974, both the largest and only significant creditor of and a substantial stockholder in Debtor corporation, and *as both* opposed any delay in the foreclosure sale (page 14, Vol. I, and pages 12-15, Vol. III, Record on Appeal). The method of better serving the interests of the stockholders and creditors would be the foreclosure proceeding which Bank as stockholder and creditor desired.

II.

THE COURT COULD MAKE SUCH FINDING AND EXCLUDE CERTAIN OF DEBTOR'S PROPERTY FROM THE CHAPTER X PROCEEDING, WHICH IN EFFECT DISMISSED ITS PETITION, ON SHORT NOTICE TO THE PARTIES.

The "good faith" filing of the petition may be challenged by Motion to Dismiss the Petition and formal pleadings and opposition are not necessary for the Court to determine the question of "good faith." See *In re Colorado Trust Deed Funds, Inc.*, 311 F.2d 288 (10th Cir. 1962). Bank's Oral Application of March 18th and Written Application of March 19th were the only expedient methods by which Bank could bring the issue before the Court since foreclosure sale was already set for the morning of the 19th. Debtor complains that the Court reversed its approval of the Petition without an Answer being filed by Bank and prior to the April 22nd hearing date set in the Order Approving Petition, dated March 15th, and did so after a hearing on March 18th at which Debtor was not present and a hearing again on the morning of March 19th when both Debtor's President and attorney were present, but did not have adequate notice thereof. But Bank's Application to

Exclude of March 19th is an Answer because it denies the allegations in Debtor's Petition and requests affirmative relief. See Appendix A.

Debtor complains that it did not receive proper notice and so was deprived of a fair opportunity to present its position. The *Marine Harbor* case puts the burden of proof on the Debtor. Debtor had an opportunity to present its need for reorganization in its Petition, and in this case, also on the morning of March 19th. It is, of course, not generally good practice to make oral applications to the trial court either without notice or upon short notice to the opposing party, but here such procedure was the only method which would allow the Court to make a decision prior to the foreclosure sale—a sale which had been pending upon Order of a State Court and after publication notice for over one month. If the Court did not have the power (but Debtor cites no authority to that effect) to modify its own procedural orders or hear evidence and argument on short notice to litigants, then considerable injustice would be done. In this case, the Debtor enjoys the right to have a restraining order issued at the last minute to prevent a foreclosure sale in the State Court and upon only his *ex parte* petition, but Debtor would deny to the Bank an opportunity to show to the Judge that the sale should not be restrained. 11 U.S.C. §607 provides that the Judge may control notice to the parties but does not require any given period of time for advance notice. Citing 11 U.S.C. Sections 713(2) and 715, the Court in *In re DCA Development Corporation* (above) said (p. 46) that even 5 hours' notice of a hearing was sufficient under its facts because in determining adequacy of notice and opportunity for hearing in bankruptcy proceedings the statutes merely require what is reasonable and appropriate in each particular case and the court "must balance the individual's interest in adequate procedure against the overall interest of efficient, final resolution of claims." Even if Debtor did not have much advance notice, the record indicates that Debtor's President and its attorney *were present* on the 19th of March. Time for legal research was not necessary as the matter decided by the Court was a factual one concerning the good faith filing of the Petition.

The Court is not required to take evidence on the issue of "good faith" if such can be resolved on the Petition itself and matters of record before the Court. See *Janif Shopping Center, Inc.* v. *Chase Manhattan Bank*, 282 F.2d 211 (4th Cir. 1960). As soon as the lack of good faith affirmatively appeared the Court acted properly in dismissing the Petition even though the plan stage had not been reached. *First National Bank of Wellston* v. *Conway Road Estates Company*, 94 F.2d 736 (8th Cir. 1938). The filing of a Petition for Reorganization under Chapter 10 being used to delay a foreclosure sale in State Court was encountered by the 4th Circuit Court of Appeals in *Arey and Russell Lumber Company, Inc.* v. *American National Bank and Trust Company of Danville, Virginia*, 201 F.2d 508 (4th Cir. 1953), wherein the Creditor, a Bank, advertised secured property for sale and the debtor, for the purpose of delaying the sale, filed a petition for an arrangement under Chapter 12 of the Bankruptcy Act, which petition was dismissed. The creditor then advertised the property for sale again and the debtor promptly filed a petition for reorganization under Chapter

10. The Court of Appeals said the Petition was properly dismissed by the trial court as not having been filed in good faith, saying:

> "the manifest purpose of the filing was to obtain just such an extension of the indebtedness secured by the deed of trust as had been sought in the Chapter 12 proceeding in which Congress had seen fit to deny to corporate debtors. Since the entire secured indebtedness was held by a single creditor that had clearly indicated that it would not grant any extension it was unreasonable to expect that a plan of reorganization could be affected."

CONCLUSION

The trial court properly concluded that giving Debtor more time to try and borrow money to pay the Bank by allowing a last-minute stay of the State Court mortgage foreclosure and the presentation of a plan of reorganization did not offer greater benefit to Creditors and Stockholders (Bank having the largest claim and owning almost one-half the stock) than the pending mortgage foreclosure and that Debtor had no right to present a plan of reorganization when the State Court proceeding better served the interests of those Creditors and Stockholders. This decision and its affirmation by the Court of Appeals, Tenth Circuit, was not a departure from the usual and accepted judicial proceedings but was in conformity with established law as shown by the authorities cited. The Court of Appeals emphasized that, under the facts of this case, Chapter X did not afford to creditors or stockholders some "benefits, advantages, or protection" which the state mortgage foreclosure denied.

The Court's statement that "although the manner in which these proceedings were handled is most unsatisfactory, . . ." referred to the actions of Debtor rather than Bank.

The Respondent Bank prays that the Petition for a Writ of Certiorari herein be denied and the cause not reviewed by this Court.

Respectfully submitted,

GEORGE VAN WAGNER
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Counsel for Respondent

October, 1975

APPENDIX

FILED
MAR 19 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY .....
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
	)	THE REORGANIZATION
PARKER SQUARE, INC.,	)	OF A CORPORATION
a corporation,	)	
	)	
Debtor.	)	NO: BK-74-434

APPLICATION FOR ORDER EXCLUDING PROPERTY FROM CHAPTER X AND DISMISSING PROCEEDINGS

Comes now the American National Bank and Trust Company of Shawnee, Oklahoma, and in support of its Application shows the court:

1. On October 23, 1973, Applicant obtained judgment in the District Court of Pottawatomie County, Oklahoma, in the amount of $83,378.87 against Parker Square, Inc. and judgment foreclosing its mortgage to satisfy said judgment; February 13, 1974, the District Court of Pottawatomie County, Oklahoma issued an Execution and Order of Sale and pursuant thereto the Sheriff of Pottawatomie County, Oklahoma, set the date of said sale for March 19, 1974, at 10:00 a.m., all as described in Exhibit "A" attached hereto and incorporated herein by reference.

2. On February 28, 1974, Applicant acquired 9,325 shares of the only class of securities issued and outstanding

of Parker Square, Inc., which shares constitute approximately 50% of the total number of shares of said Corporation issued and outstanding. The Applicant was not informed of the Petition filed herein by the Debtor under Chapter X, and does not consent thereto.

3. Applicant as shareholder and judgment creditor will suffer irreparable damage if said sale is not allowed to be held.

4. Debtor seeks jurisdiction under Chapter X for purposes of delay only and not for the purposes intended by said Chapter X, and is not entitled to relief under said Chapter X.

Wherefore, applicant requests that the Court forthwith enter its order excluding the above described property from these Chapter X proceedings and dismissing said Petition and vacating its order entered herein March 15, 1974.

CLARKE & VAN WAGNER, INC.
By [illegible]

VERIFIED

STATE OF OKLAHOMA)
) SS.
COUNTY OF POTTAWATOMIE)

Jim Earls, being duly sworn, says that he is the Executive Vice President of the American National Bank and Trust Company of Shawnee, Shawnee, Oklahoma; that he has read the foregoing Application and is familiar with the contents thereof; and that the allegations and facts set out therein are true and correct as he verily believes.

s/ Jim Earls
Jim Earls

Subscribed and sworn before me this 18th day of March, 1974.

s/ Gertrude R. Zeinemann
GERTRUDE R. ZEINEMANN, N.P.
Notary Public

My Commission Expires:

My commission expires Jan. 27, 1977

CERTIFICATE OF SERVICE

I certify that on the 3 day of October, 1975, I forwarded by first class mail, three copies of the within and foregoing Brief of Respondent, American National Bank and Trust Company of Shawnee, to the following:

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